UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

CHAMPAIGN RESIDENTIAL SERVICES, INC.[1] **Employer** **and** **TRUCK DRIVERS, WAREHOUSEMEN AND HELPERS UNION LOCAL No. 908, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO**[2] **Petitioner**	**Case No. 8-RC-16097**

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

[1] The Employer's name appears as amended at the hearing.

[2] The Petitioner's name appears as amended at the hearing.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time direct care employees, excluding all house managers, human services managers, maintenance employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.[3]

The Employer is an Ohio corporation with an office and place of business in Wapakoneta, Ohio, the sole facility involved herein, where it is engaged in providing residential services to adults with mental retardation and developmental disabilities. There are approximately 11 employees in the unit found appropriate herein.

The Employer seeks to exclude five specific employees[4] (referred to in the record by the parties and hereinafter as the "Company five") whom it claims are either not within the jurisdiction of the Board and/or lack a community of interest with the other employees in the petitioned-for unit. The Petitioner takes the position that these five employees are within the jurisdiction of the Board and also share a sufficient community of interest with the other employees to warrant their inclusion in the unit.

Than Johnson, the Employer's Executive Director, testified that the Employer operates in 15 counties in Ohio under contract with 15 different county boards of mental retardation and employs some 700 employees. The only facility involved herein concerns a residential treatment location in Wapakoneta, Ohio that has fifteen beds. The Employer employs a medical staff and

[3] The Petitioner amended the petition at hearing, without objection from the Employer, to add that it seeks to represent all "full-time and regular part-time" direct care employees.

[4] The Company five are Sally Eaton, Winnifred Fiebelkorn, Pamela Limon, Arliss Martin and Sharon Schroer.

various professional employees including registered nurses, licensed practical nurses, physical therapists and occupational therapists. The Petitioner herein seeks only to represent direct care employees also identified by the Employer as support specialists.

Direct care employees provide a number of services for the residents of the facility. They offer assistance with eating, bathing, dressing, and taking medication. They also assist residents to participate in various activities. Nearly all of the work done by the direct care employees is performed in the facility although there are a few occasions when they accompany residents to outside activities. The direct care employees at the Wapakoneta facility are directly supervised by the Home Manager, Cynthia Norton. The latter answers to a County Director who is not located on site.

The record demonstrates that the Employer operates the Wapakoneta facility pursuant to a contract with the Auglaize County, Ohio Board of Mental Retardation. Its operation of the facility began on January 1, 1999 and the current contract binds the parties until December 31, 2001. Prior to January 1, 1999, the facility was directly managed by the County. The latter previously had a collective bargaining agreement with the Ohio Education Association (OEA) and the Company five were part of that bargaining unit.

When the County decided to contract operation of the facility, it entered into an agreement with the OEA regarding the future of the direct care employees. As a result, the request for proposal (RFP) issued by the County to prospective contractors specified certain minimum assurances that had to be provided to this group of employees. These provisions of the RFP were thereafter incorporated into the County's contract with the Employer.

The latter agreement mandates that those County employees who were retained by the Employer, namely the Company five, cannot be terminated except for "just cause." Just cause is

not defined in the contract but the RFP includes a list of those offenses considered sufficient to warrant termination. The Employer's contract also specifies that the Company five shall receive a benefit package at least equal to the benefits that they had been receiving from the County. It includes a provision that the Employer is to provide for the continued participation of the Company five in the Ohio Public Employees Retirement System (PERS) or in a 403(b) retirement plan. The contract further requires the County to maintain their wage rates and to provide a $.23 per hour wage raise to offset the increased employee contribution to pay the insurance premium.

According to the Employer, these contractually mandated terms and conditions of employment remove the Company five from the jurisdiction of the Board, or, in the alternative, undermine any community of interest they may have with subsequently hired employees. With respect to the Employer's first argument, it maintains that because wages and benefits are set by the County, the Employer lacks sufficient control over terms and conditions affecting the Company five. As a result, it does not meet the statutory definition of "employer."

Should this argument fail, the Employer claims that the contractually mandated terms and conditions applicable to the Company five place their interest at odds with that of unit employees hired after the Employer began operation of the facility. The latter receive lower wages than the Company five and do not enjoy all of the same benefits.[5] The Company five also receive two additional personal leave days to compensate them for paid holidays they lost when the Employer took over the facility. In addition, the newer employees do not have the option of participating in the PERS retirement plan since they are not public employees.

[5] Record evidence offered by the Employer shows that the hourly rate for the Company five employees ranges from $8.33 to $12.50 while the range for the other direct care employees runs from $7.55 to $7.85.More specifically, the rates for the Company five are as follows: Eaton, $8.33; Fiebelkorn, $8.33; Limon, $10.02; Martin, $9.51; and, Schroer, $12.50.

The record reveals, through the testimony of Than Johnson, that the Company five share significant common terms and conditions of employment with other unit employees. The Employer has a common job description that applies to all direct care employees regardless of whether they are in the Company five. The educational requirements and job skills are the same for both groups. They perform the same day to day tasks in and out of the facility and provide the same services to residents. All direct care employees attend the same regularly scheduled employees meetings.

Except for the applicable provisions of the contract with the County, Company five employees are subject to the same employee handbook and labor policies as the other employees. They are commonly supervised on the job by the Home Manager. There is no difference in the way the Company five employees are scheduled or in the overtime pay policy that applies to them. They all receive the same health insurance benefits. The evaluation process employed by the Employer is the same for all employees. Furthermore, the Employer does not distinguish between these groups of employees when issuing bonus awards. Finally, all direct care employees, regardless of whether they are in the Company five, work in direct contact with each other every day and frequently engage in joint activities.

Regarding the jurisdictional issue, the Employer, in its brief, acknowledges that current Board law is not in its favor. It relies on the Board's holding in **Res-Care, Inc., 280 NLRB 670 (1986)** wherein the Board, in deciding whether to assert jurisdiction, closely examined the extent to which a governmental entity controlled the labor relations of the employer. The standard set in that case and its progeny, however, was abandoned by the Board in **Management Training Corporation, 317 NLRB 1355 (1995)**. In the latter case, the Board held that when reviewing jurisdictional issues in cases involving employers who are parties to contracts with exempted

government agencies, it will only consider whether the employer meets 1) the statutory definition of "employer" in Section 2(2) of the Act and 2) the applicable monetary jurisdictional standards.

There is no dispute with respect to the instant facts that the Employer is an employer within the meaning of Section 2(2) of the Act. It makes no contention that it is an exempt government entity. Furthermore, the Employer stipulated that it meets Board monetary jurisdictional standards. I therefore find that the Employer is an employer within the meaning of the Act and is subject to the jurisdiction of the Board. **Management Training Corporation**, **Ibid**. The Employer, moreover, has offered no compelling reason why the Board should decline to exercise its jurisdiction in this matter.

Regarding the Employer's argument of a lack of community of interest between the Company five and other unit employees, the Employer has offered no case support that is factually on point. Rather it relies on the provisions of the contract with Auglaize County that distinguish the Company five by stipulating minimum wage and benefit levels and affording them just cause termination protection. While there are differences that apply to the Company five, they are offset by the strength of those common interests, identified above, that they share with the other direct care employees.

In determining whether employees share a community of interest, the Board considers a number of factors including the following: the degree of functional integration; common supervision; the nature of employee skills and functions; contact among employees; work situs; general working conditions; and, benefits. The Board's focus has primarily been upon the work performed and whether the employees at issue engage in jobs within the unit description. Thus, in **K.G. Knitting Mills, 320 NLRB 374 (1995)**, the Board held that although a certain group of employees received a salary, did not punch time clocks, received different health benefits from

other unit employees, and were able to adjust their own hours, their exclusion from the unit was not warranted. Rather, the Board ordered their inclusion precisely because these employees performed the same work as other unit employees and fit the unit description.

With respect to the instant case, the Company five perform the same work as other unit employees, exercise the same skills and job functions, work jointly with other unit employees on a daily basis at the same location, and share common supervision. They are also subject to the same labor policies except for those mandated by the Auglaize County contract. With respect to the wage differences created by the latter, they are not so significant as to cause a clash in interests. Two members of the Company five earn a mere $.48 per hour more than some of the other direct care employees. The Board, moreover, has held that distinctions in rates of pay are not alone sufficient to destroy a community of interest among employees. **Four Winds Services, 325 NLRB 632 (1998).** In that case the Board considered the fact that some employees were paid under the Davis Bacon Act and others were not and found that such a distinction did not warrant separate units.

The differences in benefits among the employees in the instant case are also not that glaring given that all direct care employees receive the same health benefits. Since the County contract specifies only minimum levels of pay and benefits for the Company five, these matters are open to discussion for all employees within the context of collective bargaining.[6]

The main differences that remain then for the Company five are their just cause status and their retirement benefit. The record is not clear as to what, if any, participation the Company five maintain in PERS since they are no longer public employees. Furthermore, with respect to the issue of discipline, the Employer acknowledges that it presently applies the same appeal

[6] Indeed, the Employer admits that it has funds available to discuss pay raises and that it has already implemented incentives to attract new hires.

procedure to all employees. These matters, moreover, would also be amenable to collective bargaining without causing a collision of interests between the Company five and other unit employees.

In conclusion, the stipulations of the Employer's contract with Auglaize County may create something of a two-tiered system for unit employees with respect to pay, benefits and discipline. Nevertheless, they do not offset the shared terms and conditions of employment regarding daily work that give the Company five a substantial community of interest with other unit employees. I shall therefore include the Company five employees in the unit found appropriate herein.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have

been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **TRUCK DRIVERS, WAREHOUSEMEN AND HELPERS UNION LOCAL No. 908, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO.**

LIST OF VOTERS

In order to ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. **Excelsior Underwear Inc., 156 NLRB 1236 (1966)**; **N.L.R.B. v. Wyman-Gordon Co., 394 U.S. 759 (1969)**. Accordingly, it is directed that an eligibility list containing the ***full*** names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this decision. **North Macon Health Care Facility, 315 NLRB 359 (1994)**. The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request

must be received by the Board in Washington, by September 27, 2000.

Dated at Cleveland, Ohio this 13th day of September, 2000.

/s/ Frederick J. Calatrello

Frederick J. Calatrello
Regional Director
National Labor Relations Board
Region 8

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